Midland Veneers Ltd v Unilock HCP Ltd [1998] ABC.L.R. 03/12

CA on appeal from QBD (His Honour Judge Wilcox) before Evans LJ; Peter Gibson LJ; Thorpe LJ; 12th March 1998.

LORD JUSTICE EVANS:

1. Lord Justice Thorpe will give the first judgment.

LORD JUSTICE THORPE:

2. In 1993 an office building in Cavendish Square was being refurbished and Wallis Limited were the head contractors. Midland Veneers were supplying Wallis with Swiss pear veneered fittings and Unilock contracted with Wallis to provide specialist heating fittings which required to be masked by joinery that would match precisely the fittings that Midland Veneers were installing for Wallis. Midland Veneers regarded themselves as being in a relatively powerful contractual position, since if they did not reach agreement with Unilock Limited they conceived that Wallis would inevitably contract with them direct.

3. The negotiations between Midland Veneers and Unilock progressed to a point in July 1993 when a letter of intent was dispatched. The first two paragraphs read:

   "This letter is to confirm on the basis of us receiving a written order from Wallis, our intention to place an order with you for the supply of veneered panels as per your quotations ...

   Should we not be in a position to place an order with you, for any reason, all reasonable costs will be met by this company for work undertaken."

4. Pursuant to that letter of intent certain goods were in due course supplied as a preliminary in the progress towards a full blown contract.

5. The second important stage came in August when on the 25th Unilock placed an order with Midland Veneers. The order was: *"To manufacture and supply induction unit casing panels strictly in accordance with the details contained upon this order."*

6. There was a lot of specification and detail extending over three pages, and following that detail it was specified that:

   "Embodied within your order with this company will be the terms of our order with the main contractor, a copy of which is attached (minus the detailed price) and you are to indemnify us fully against any action caused by your breach of any terms and conditions contained within this contract and more particularly this order, whatsoever.

   Liquidated and ascertained damages for non performance are set at £75,000.00 per week or part thereof."

7. Then, finally: *"A condition of this order is that you provide us with a Parent Company Guarantee from your ultimate parent company in a form acceptable to Unilock Limited."*

8. These three pages had on their reverse Unilock's standard conditions of order.

9. The plaintiffs' response was immediate. On the following day they dispatched a letter which was headed up in capitals and underlined **" ACKNOWLEDGEMENT OF ORDER "**. The letter itself read:

   "Thank you for your valued order which has been passed to our production unit for processing.

   They will send you their Order Acceptance shortly, or will contact you if full manufacturing details have not been received with your order.

   Please be advised that our delivery period can only run from receipt of full and final manufacturing details from yourselves."

10. Thereafter a considerable trial of strength developed between the negotiating parties as to whether Midland Veneer would impose their standard terms and conditions on Unilock or vice versa. There was a meeting between the parties in October and subsequently there was an exchange of letters, culminating in a letter of 3rd November which, having referred to the meeting of 13th October and subsequent correspondence, stated:

    "... we are writing to confirm the agreement reached with regards to our order ...

    We agree to accept the letter of comfort from your Parent Company ... dated 16 July 1993 in preference to a Performance Bond. We also accepted that the liquidated damages stated in our order would be waived on agreement that you could meet the original programme requirements, subject to the information being provided six weeks before these dates.

    Your confirmed that subject to the foregoing, the remainder of our order was acceptable."

11. On that the parties proceeded. There were deliveries and acceptances. But by 24th November there were obvious signs of impending dispute. A letter of that date from Unilock to Midland Veneers expressed concern over failure to adhere to delivery dates and also as to damage in transit and other defects. The issue of proceedings came on 21st July 1995 and subsequently there was an order for the trial of a preliminary issue. The trial took place over three days in July 1996. At the trial the preliminary issue was re-defined with the consent of the parties in these terms:

    "(i) 'What was the contractual basis if any between the parties?

    (ii) If there was a concluded contract, were the standard terms of either the plaintiff or the defendant incorporated into the contract?'"

12. The Official Referee, Judge Wilcox, dated his written judgment on the preliminary issue 1st August, and it was handed down on the 6th. The terms of his concluding paragraph did not specifically address the preliminary questions which were stated at the opening of the judgment, and accordingly he was asked by counsel for

Midland Veneers to extend his judgment to answer the preliminary question specifically. He said that his answer to question 1 was no contract between the parties; accordingly question 2 did not arise.

13. In the light of that judgment on a subsequent occasion much of the pleading in the amended defence and counterclaim was struck out. Notice of appeal was lodged on 18th September 1996 and in January 1997 a stay was obtained by the defendants from this court.

14. The judge arrived at the conclusion that there was no contract between the parties by chronological stages. He considered carefully the exchange of correspondence on 25th, 26th and 27th August. He emphasised that the letter of 26th August had been headed **" ACKNOWLEDGEMENT OF ORDER ".** He emphasised that Unilock's rejoinder on the following day had referred to the letter of the 26th as *"a letter acknowledging receipt of our order for the above contract."* The judge's conclusion was that there was plainly no acceptance. He then considered at length the oral evidence of the principals who had negotiated on behalf of Unilock and on behalf of Midland Veneers. He emphatically preferred the evidence of the witnesses for Midland Veneers. The principal witness for Midland Veneers was a Mr Johnson. In relation to the all important meeting on 13th October the judge found: *"Mr Johnson was adamant and I accept his evidence that neither he nor Mr Edwards had the authority to vary the terms and conditions and Mr Johnson as the senior and responsible negotiator would have been prepared to reject the work if it meant proceeding upon [Unilock's] terms."*

15. In relation to the rival evidence from Mr Mason, principal negotiator for Unilock, the judge said that he rejected it.

16. As to the subsequent communication leading up to the letter of 3rd November, the judge considered Mr Mason's evidence that he had two further telephone conversations after 13th October with Mr Johnson when the terms of the defendant's order were discussed and when Mr Johnson expressly confirmed that, provided the terms relating to liquidated damages and incorporation of the Wallis terms were removed, the plaintiffs would accept the remainder of the terms of the order of 25th August. The judge said, "*I am satisfied that Mr Mason is wrong in his recollection about those telephone calls.*" The judge on the following page continued: *"The defendants alternatively contend that arising out of the meeting of 13th October and the subsequent letter of 15th October the plaintiffs made an offer which was accepted by the defendants' letter of 3rd November, namely an offer to contract upon the defendants' terms providing the liquidated and ascertained damages condition was dropped and the incorporation of the articles of agreement between Wallis and the defendants. I have reviewed the evidence relating to those meetings and I reject that analysis. What is plain in this case is that both parties were striving to conclude an agreement but were negotiating from very fixed positions from which neither would yield."*

17. The judge ended his judgment with a short paragraph under the subheading **"Conclusion".** He said:
"In practical terms it matters not whether there was an 'if' contract as I have indicated above or no contract, since the essential consequence in terms of price is exactly the same. The standard conditions of neither the plaintiff or the defendant were incorporated into any contract.
The only matter where the parties were ad idem was as to price, pending final agreement."

18. Miss O'Rourke in advancing her appeal first of all attacked the judge's conclusion that the letters of 25th, 26th August 1993 did not amount in law to a contract. Her argument that there was an acceptance by letter of 26th August is manifestly an extraordinarily difficult argument to pursue in view of the terms of the letter, which are far from ambiguous. It is specifically said to be only an acknowledgment of order. It specifically says that it is being passed to another division which will either send their acceptance or will contact the offerer if further details are required. Manifestly that cannot in law amount to acceptance and the attempt to dress it as acceptance is, in my judgment, hopeless.

19. Alternatively, Miss O'Rourke says, "*Well, there is acceptance to be spelt out from the fact that Midland Veneers never did seek further manufacturing details.*" That submission is equally unpersuasive and was hardly pressed.

20. Then she said that alternatively there was acceptance by the subsequent acceptance of the deliveries. But that submission has subsequently merged into her third attack, to which I will come in due course.

21. Secondly, she said that there was plainly a substantial agreement as to price specification and performance, that that was all achieved in October or certainly by 3rd November, and that the judge was wrong to have held, as he did, that there was no contract. That submission also seems to me hopeless, since there are plain findings of fact made by the judge in relation to the communications in October and as to the effect of the letter of 3rd November, all of which preclude the finding of an agreement by those communications.

22. Miss O'Rourke's third submission is the only one that held any prospect of success. She said, finally, that here was a case in which there was an executed contract by way of delivery and acceptance. Furthermore, there were clear agreements as to price, specification and performance. All that the parties had failed to establish was which of the sets of standard conditions was to come into operation to provide some extra armoury beyond those specific terms and conditions expressly agreed and necessary for the performance of this supply contract. The standard terms and conditions, whether on one side or the other, were something of a luxury and by no means necessary for the operation or construction of the contract.

23. She then sought to draw attention to passages in the cross- examination of Mr Johnson in which he had had put to him that there had been substantial acceptance of her clients' requirements in the three fields of price specification and performance. It is first of all to be noted that her case was not pleaded in that manner in the

amended defence and counterclaim. The case was not argued in that manner before the judge and essentially depends in this court upon a challenge to the judge's findings as to the credibility of the witnesses and as to fact.

24. When faced with this obstacle by the intervention of Mr Lofthouse, Miss O'Rourke carefully reconsidered her position, and after the adjournment she specifically said that she did not seek to challenge or dispute any of the judge's findings as to the evidence or as to fact. All she sought to do was to amend her notice of appeal and her skeleton argument in relatively minor degree in order to make it plain that she above all relied upon the fact that this was an executed contract in relation to which there had been substantial agreement as to the detail of price, performance and specification. Specifically she said that she directed her ultimate challenge to the last sentence of the judge's judgment. That sentence I have already read, but I re-emphasize it: ***"The only matter where the parties were ad idem was as to price, pending final agreement."***

25. That, she said, was a finding of law that she was entitled to challenge. In my judgment that is a hopeless submission. It is manifestly a finding of fact and the reality is that if Miss O'Rourke was to advance in this court an attack upon this judgment which had any prospect of success it was absolutely necessary for her to acknowledge that she was challenging the judge's findings of fact and seeking to demonstrate that it was not open to him to make those findings on the evidence of the witnesses. In the end I conclude that there is no argument on any point that could properly be categorised as a point of law that Miss O'Rourke can advance today with any prospect of success. The essential issue for the Official Referee was to make an assessment of the witnesses and to endeavour to make findings through the elaborate and confused negotiations that preceded the delivery of goods. That is precisely what he did. It may be that he did not express his finds as clearly as he might have done, but nonetheless they are conclusively in favour of Midland Veneers. It was plainly open to him to conclude as a matter of law on those findings of fact that there was no contract between the parties.

26. In the result the future action between the parties depends upon rights arising from the delivery and acceptance of goods. Mr Lofthouse accepts that in the future evaluation of the goods delivered it is open to the court to reduce the plaintiff's claim not only for defects but also possibly for delay.

27. In my judgment this appeal fails and should be dismissed.

LORD JUSTICE PETER GIBSON:

28. I agree.

LORD JUSTICE EVANS:

29. I also agree. The defendants' case as pleaded and as argued before the Official Referee and in this court was that the goods were supplied by the plaintiffs to the defendants under the terms of a contract of sale which was agreed either on 25th/26th March, that is to say by exchange of the defendants' order and the plaintiffs' letter headed " **ACKNOWLEDGEMENT OF ORDER** " in reply, or on or before 3rd November when a meeting took place between the parties after further written exchanges had taken place. There was a letter of intent dated 16th July. That kind of document could be relevant in two ways, but neither of them is relevant here. It is of course an expression of intention to place an order, but that by definition does not have any contractual effect. It is also an undertaking to pay for work done, and on the face of it that undertaking is superseded if the goods are in fact manufactured and supplied.

30. That a contract may arise in circumstances where work is done on the strength of a letter of intent was recognised by Robert Goff J (as he then was) in the case of ***British Steel Corporation v Cleveland Bridge & Engineering Co Ltd*** [1984] 1 All ER 504, but, as he held in that case, it does not necessarily do so. A contract arising from the letter of intent is not relied upon here.

31. I would hold, for the reasons given by my Lord, that both arguments as to the existence of an express contract of sale must fail.

32. There is a further possibility which apparently was identified for the first time in this court. This is that there was an implied contract arising from the delivery and acceptance of the goods, the legal analysis being set out in the judgment of this court in ***G Percy Tretham Ltd v Archital Luxfer Ltd*** [1993] 1 Lloyd's Reports 25. This case has not been formulated until today. Mr Lofthouse submits that it is conceptually wrong, relying on the judgment of Robert Goff J in the ***British Steel Corporation case.*** I would not go so far as he submits we should, but it is unnecessary to decide that issue today. Here there is the finding in the last sentence of the judgment which has been quoted by my Lord that the parties were not ad idem, that is to say in English, they did not agree save as to price. Clearly that is a finding of fact. The consequence is that even if there was an implied contract it was a contract into which only a term as to price could properly be implied. The consequence is that the remedy under such a contract would be no different from the claim for a reasonable price, which is already made. Mr Lofthouse has recognised that it is at least arguable that in assessing the amount of a reasonable price the court may be entitled to take some account of delay, but that is a matter for argument which does not concern us further today.

ORDER: Appeal dismissed with costs.

MISS M O'ROURKE (instructed by Messrs S J Berwin & Co, London WC1X 8HB) appeared on behalf of the Appellant/Defendant.
MR S LOFTHOUSE (instructed by Messrs Townsends, Swindon, Wiltshire) appeared on behalf of the Respondent/Plaintiff.